PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
CenturyLink Communications, LLC and Level 3 Communications, LLC,	)	
	)	Docket No. 18-73
Complainants,	)	
	)	File No. EB-18-MD-002
v.	)	
	)	
Birch Communications, Inc.,	)	
	)	
Defendant.	)	

BIRCH COMMUNICATIONS, LLC BRIEF IN SUPPORT OF ANSWER

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BIRCH COMMUNICATIONS, LLC BRIEF IN SUPPORT OF ANSWER

Birch Communications, LLC ("Birch"), as successor to the named Defendant, Birch Communications, Inc.,[1] submits this Brief in support of its Answer to the Formal Complaint ("Complaint") filed by Complainants CenturyLink Communications, LLC ("CenturyLink") and Level 3 Communications, LLC ("Level 3") in the above-referenced matter.

PRELIMINARY STATEMENT

Complainants in this adjudicatory proceeding belatedly raise an important industry issue of first impression before the Commission, *i.e.*, whether or not Birch, as a competitive local

[1] Effective December 30, 2017, Birch converted from a corporation to a limited liability company ("LLC") in its home state of Georgia, and is now known as "Birch Communications, LLC." *See* Exhibit 1 to Affidavit of Angela F. Collins in Support of Birch Answer to Formal Complaint of CenturyLink and Level 3 (hereinafter "Collins Affidavit") (attached as Exhibit C to Answer). On January 5, 2018 in WC Docket No. 17-301, the Wireline Competition Bureau approved a transaction between Birch and Fusion Telecommunications International, Inc., which includes an internal corporate restructuring of various Birch companies. In contemplation of the closing of that transaction and its name change, Birch has filed a new interstate access tariff with the Commission reflecting its conversion to an LLC and the corporate restructuring. *See* Exhibit 4 to Affidavit of Stephen Hayes in Support of Birch Answer to Formal Complaint of CenturyLink and Level 3 (hereinafter "Hayes Affidavit") (attached as Exhibit B to Answer). As explained in the transmittal letter accompanying the tariff filing, the Birch Communications, LLC Access Services Tariff FCC No. 1 (scheduled to take effect April 26, 2018) contains the same rules, regulations, and rates as the tariff it is replacing, the Birch Communications Access Services Tariff FCC No. 1 (originally effective October 24, 2008) (hereinafter referred to as the "Birch FCC Tariff").

exchange carrier ("CLEC"), is entitled to charge a tariffed presubscribed interexchange carrier charge ("PICC") in addition to the benchmark rate for switched exchange access services. In 2008, Birch Telecom, Inc. was acquired by Access Integrated Networks, Inc. ("AIN"), which renamed itself and its tariffs Birch Communications, Inc.[2] Prior to the acquisition, AIN charged a PICC pursuant to its tariff in the nine-state BellSouth region. It continued to do so pursuant to its renamed tariff covering that region, and Complainants and several other customers of Birch **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** have paid the PICC for many years.[3] CenturyLink first challenged the PICC in January 2017,[4] and Level 3 first raised the issue over a year later.[5] To this day, no one other than Complainants has challenged the Birch PICC, nor to Birch's knowledge have any customers of CLEC competitors of Birch challenged PICCs charged by such competitors.[6]

The market practice of charging a PICC in addition to switched exchange access service charges is supported by sound public policy. The Commission repeatedly has stated in the context of the PICC that one of its goals is to permit carriers to recover their costs in a manner that reflects the way in which they are incurred.[7] The Commission, therefore, established the

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2 Hayes Affidavit ¶ 4; *see also* WC Docket No. 07-270, *Notice of Domestic Section 214 Authorization Granted*, Public Notice, DA 07-5109 (rel. Dec. 31, 2007) (Exhibit 25 hereto); *Access Integrated Networks d/b/a Birch Communications*, ITC-214-19970926-00584 (Nov. 14, 2008) (noting name change) (Exhibit 28 hereto).

3 Hayes Affidavit ¶ 5; *see also* WC Docket No. 07-270, *Domestic Section 214 Application filed for the Transfer of Control of Birch Telecom, Inc. to Access Integrated Networks, Inc.*, Public Notice, DA 07-4784 (rel. Nov. 29, 2007) (Exhibit 26 hereto) (stating that AIN provided service only in the 9-state BellSouth territory of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee).

4 Exhibit O to Complaint.

5 Complaint ¶ 32.

6 Hayes Affidavit ¶ 6; *see also infra* Section 1 (discussing the PICCs contained in tariffs on file with the Commission).

7 *See, e.g., Access Charge Reform*, 12 FCC Rcd 15982, ¶¶ 36, 53-54, 104 (1997) ("*1997 Access Charge Order*") (Exhibit 10 hereto); *see also Access Charge Reform*, 12 FCC Rcd 16606, ¶ 16 (1997) ("*1997 Reconsideration Order*") (Exhibit 3 hereto) ("One of the primary goals of our *First Report and Order* was to develop a cost-recovery mechanism that permits carriers to recover their costs in a manner that reflects the way in which those costs are incurred."); *Defining Primary Lines*, 14 FCC Rcd 4205, ¶¶ 7-9 (1999) ("*Primary Lines*")

flat-rated per-line PICC to recover costs that historically were recovered through per-minute of use charges.[8] Thus, it makes sense that the flat-rate PICC should be excluded from the per-minute of use switched exchange access service benchmark.[9]

For the foregoing reasons, as further elaborated below, Complainants should be denied any relief whatsoever because it was lawful for Birch to charge them the PICC in addition to the switched exchange access service benchmark rate. In no event, however, would Complainants be entitled to retroactive relief because this case presents an issue of first impression which affects a significant portion of the industry.

ARGUMENT

I. THE PICC IS NOT AND WAS NEVER INTENDED TO BE PART OF THE SWITCHED EXCHANGE ACCESS SERVICE BENCHMARK

1. History of the PICC

The local loop connects a customer to the local exchange network so the customer can make and receive intrastate calls, and also connects the customer to an interexchange carrier network so the customer can make and receive interstate calls.[10] When it first adopted uniform access charge rules in 1983, the Commission allowed local exchange carriers to recover some of

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(Exhibit 9 hereto) ("Under principles of cost-causation, it is most economically efficient for incumbent LECs to recover the costs of providing interstate access in the same way that they incur them. Under such principles, incumbent LECs should recover their traffic-sensitive costs of interstate access through per-minute charges, and should recover their non-traffic-sensitive costs through flat charges.").

[8] *1997 Reconsideration Order* ¶¶ 5-6 ("To the extent that SLC ceilings prevent price cap LECs from recovering their allowed common line revenues from end users, LECs will recover the shortfall, subject to a maximum charge, through a presubscribed interexchange carrier charge (PICC), a flat, per-line charge assessed on the end-user's presubscribed interexchange carrier. The PICC, which over time will shift revenue recovery from the per-minute CCL charges to a flat-rated charge assessed on IXCs, was designed to allow price cap LECs to recover the difference between revenues collected through the SLCs and the total revenue permitted for the common line basket."); *see also Primary Lines* ¶ 9 ("the Commission also created the PICC: a flat, per-line charge that price cap LECs may assess on an end user's presubscribed IXC").

[9] *1997 Reconsideration Order* ¶ 74 ("As a flat-rated charge, the PICC will not artificially suppress demand for interstate toll telecommunications services."). If a local exchange carrier were to attempt to state PICC as a per-minute charge, there would be the risk that the charge could exceed the cap of $4.31 per month per line prescribed in 47 C.F.R. § 69.153(a).

[10] *Primary Lines* ¶ 5.

the interstate costs of providing the local loop through a flat, monthly end-user common line charge assessed on end users (known as the end user common line charge or "EUCL" or subscriber line charge or "SLC").[11] In addition, the Commission allowed local exchange carriers to recover the remainder of their interstate costs attributable to the local loop through a per-minute carrier common line ("CCL") charge assessed on interexchange carriers.[12]

In 1997, the Commission concluded that "implicit subsidies embodied in the existing system of interstate access charges cannot be indefinitely maintained in their current form."[13] As part of that analysis, the Commission determined that common line (or "local loop") and other non-traffic-sensitive costs "do not increase with each additional minute of use transmitted over the loop."[14] In an effort to rationalize the rate structure in light of this finding, the Commission began to phase-out the CCL charge on the grounds that recovering the non-traffic-sensitive loop costs through traffic-sensitive charges is economically inefficient.[15] To provide local exchange carriers with a means to recover some of the loop costs they previously recovered in the CCL charge, the Commission increased the SLC cap and created the PICC, a flat, per-line charge assessed on an end user's presubscribed interexchange carrier.[16]

Because the cost of the local loop "does not increase with usage," the Commission determined "the costs should be recovered through flat non-traffic-sensitive fees."[17] The Commission consistently has found:

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11 *MTS and WATS Market Structure*, 93 F.C.C.2d 241 (1983) (Exhibit 42 hereto).

12 *Primary Lines* ¶ 6.

13 *1997 Access Charge Order* ¶ 35.

14 *1997 Access Charge Order* ¶ 69.

15 *Primary Lines* ¶ 7.

16 *Primary Lines* ¶¶ 8, 9.

17 *1997 Access Charge Order* ¶ 54.

> to the extent possible, costs of interstate access should be recovered in the same way that they are incurred, consistent with principles of cost-causation. Thus, the cost of traffic-sensitive access services should be recovered through corresponding per-minute access rates. Similarly, NTS costs should be recovered through fixed, flat-rated fees.[18]

Thus, the "principal effect" of the 1997 *Access Charge Order* was "to reduce the amount recovered through per-minute interstate access charges and increase the amounts recovered through flat-rated charges."[19] The Commission found "NTS costs incurred to serve a p*articular customer* should be recovered through flat fees, while traffic-sensitive costs should be recovered through usage-based rates."[20] The "rate restructuring" undertaken in 1997 resulted "in substantial reductions in the charges for usage-rated interstate access services."[21]

Part 69 of the Commission's rules "establishes rules for access charges for interstate or foreign access services."[22] The term "access service" means "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."[23] The Commission's "access charge rules" translate costs "into charges for the specific interstate access services and rate elements," and "Part 69 specifies in detail the rate structure for recovering those costs."[24] One of the permissible "carrier's carrier charges for access service" in the Commission's Part 69 rules is the "presubscribed interexchange carrier" charge.[25] The Part 69 rules contain "the precise manner in which [carriers] may assess charges on interexchange

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18 *1997 Access Charge Order* ¶ 24.

19 *1997 Access Charge Order* ¶ 53. Acceptance of Complainants' assertion that the PICC was intended to be included in the Benchmark Rule is contrary to the "principle effect" of the Commissions access charge reform and would result in the economic inefficiency the PICC was designed to correct. *Id.*; *see also Primary Lines* ¶¶ 7-9.

20 *1997 Access Charge Order* ¶ 36 (emphasis added).

21 *1997 Access Charge Order* ¶ 43.

22 47 C.F.R. § 69.1(a) (Exhibit 1 hereto).

23 47 C.F.R. § 69.2(b).

24 *1997 Access Charge Order* ¶ 22.

25 47 C.F.R. § 69.4(h).

carriers and end users"[26] and how the "charges for each access element" are to be computed.[27] Some elements are charged based on "access minutes" or "access minutes of use,"[28] which are defined as "usage of exchange facilities in interstate or foreign service for the purpose of calculating chargeable usage."[29] Other elements, like the PICC, are charged "per line per month."[30]

"Access service" encompasses not only "switched exchange access service" but also a broad scope of services that are not "switched exchange."[31] The Commission has defined "switched access services" as "the means by which interexchange carriers (IXCs) obtain access to local telephone exchanges to complete interstate long distance telephone calls," and stated that "IXCs historically paid LECs a per-minute charge for this access."[32] The "[c]harges for the origination or termination of interexchange services that use switching in the local or end office switch are known as switched access charges."[33] "Switched Access services are those that

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26 *1997 Access Charge Order* ¶ 22.

27 47 C.F.R. § 69.101, *et seq*.

28 Charges for elements such as carrier common line, local switching, tandem switched transport, and interconnection charges are based on access minutes. *See, e.g.*, 47 C.F.R. §§ 69.106(a), 111, 124, 154.

29 47 C.F.R. § 69.2(a). The rule further states: "On the originating end of an interstate or foreign call, usage is to be measured from the time the originating end user's call is delivered by the telephone company and acknowledged as received by the interexchange carrier's facilities connected with the originating exchange. On the terminating end of an interstate or foreign call, usage is to be measured from the time the call is received by the end user in the terminating exchange. Timing of usage at both the originating and terminating end of an interstate or foreign call shall terminate when the calling or called party disconnects, whichever event is recognized first in the originating and terminating end exchanges, as applicable." *See id.*

30 47 C.F.R. § 69.153(a).

31 *Connect America Fund*, 26 FCC Rcd 17663, ¶ 957, n.1961 (2011) ("*2011 Intercarrier Compensation Order*") (Exhibit 15 hereto) (citing *MTS and WATS Market Structure*, 93 F.C.C. 2d 241, ¶ 23 (1983)) ("Terms such as access, access service and access charges will be used in this *Third Report and Order* to encompass both end user and carrier's carrier charges."). Of course, the defined term "switched exchange access service" means exactly what the Commission says it means in the definition of that term in 47 C.F.R. § 61.26(a)(3)(i), no more and no less, irrespective of what colloquial meaning might otherwise be given to the term absent a definition. *See* 47 C.F.R. § 61.26 (Exhibit 2 hereto).

32 *Technology Transitions*, 31 FCC Rcd 8283, ¶ 12 (2016) (Exhibit 17 hereto).

33 *NYNEX Telephone Companies Petition for Waiver*, 10 FCC Rcd 7445, ¶ 5 (1995) (Exhibit 44 hereto).

involve use of local switching by the telco's end office for access."[34] The PICC, in contrast, is a flat monthly fee, is not determined by reference to variable utilization of local switching, and is charged only in connection with multi-line business service for a particular customer.

When it established the PICC in 1997, the Commission created gradually increasing caps on the amount of PICC that could be assessed on interexchange carriers and found that the PICC should be applied to primary residential, non-primary residential, single-line business, and multi-line business lines.[35] The Commission's actions in 1997 were intended to be the initiation of access reform that would create "cost-based access charges . . . by letting competition establish efficient rates" with the Commission anticipating the creation, "in a later stage of access reform, a mechanism whereby rate regulation of services would be lessened, and eventually eliminated, as competition developed."[36]

In 2000, the Commission revisited the PICC in connection with other access reform measures. While the Commission found PICCs "markedly reduced the per-minute recovery of local loop costs and raised flat recovery of non-traffic sensitive costs," PICCs also created market inefficiencies because IXCs "marked-up and passed-through the PICC to end users."[37] Thus, in the 2000 *CALLS Order*, the Commission adopted a five-year transitional plan for

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[34] *Investigation of Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082, ¶ 37 (1984) (Exhibit 41 hereto); *see also Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metro. Statistical Areas*, 23 FCC Rcd 11729, ¶ 25 (2008) (Exhibit 24 hereto) ("Switched access services use local exchange switches to route originating and terminating interstate toll calls.").

[35] *1997 Access Charge Order* ¶¶ 55-59.

[36] *Access Charge Reform*, 15 FCC Rcd 12962, ¶ 20 (2000) ("*CALLS Order*") (subsequent history omitted) (Exhibit 11 hereto).

[37] *CALLS Order* ¶¶ 19, 86; *see also Access Charge Reform*, 18 FCC Rcd 12626, ¶ 3 (2003) (Exhibit 7 hereto) (recognizing that IXCs "typically passed on the PICCs to its end users to pay for the PICCs assessed by the LEC"). As a wholesale long distance carrier, CenturyLink passes-through PICCs to its customers as reflected in the wholesale reseller agreement between Birch and CenturyLink. *See* Hayes Affidavit ¶ 7; *see also* Exhibit 14 to Hayes Affidavit. Under the header of "Primary Interexchange Carrier (PIC) Services," CenturyLink assesses Birch a monthly "Access Line Charge" for "multi-business lines (Billing Telephone Number with multiple Working Telephone Numbers) assigned to CenturyLink for long distance." *See* Hayes Affidavit ¶ 8; *see also* Exhibit 14 to Hayes Affidavit.

"interstate access reform" based on the proposal put forth by the Coalition for Affordable Local and Long Distance Service ("CALLS"), which included a new regime for PICCs. Specifically, the Commission immediately eliminated residential and single-line business PICCs, capped the PICC for multi-line businesses at $4.31 per month per line, and took steps to reduce the PICC over time until it was completely eliminated.[38] As part of the goal to eliminate the PICC, the Commission permitted a greater proportion of the local loop costs to be recovered through the SLC and allowed for gradual increases to the SLC over time.[39] The Commission intended the multi-line business PICC to be "a transitional mechanism that recovers revenue that would otherwise be recoverable through charges on residential and single-line business lines" because it represented a "better approach in establishing a more efficient interstate access charge rate structure consistent with [the Commission's] long-term universal service goals in a competitive local exchange environment."[40]

The Commission estimated the multi-line business PICC would be eliminated for most subscribers by July 2004 and committed to reviewing the issue after the five-year transition to "consider additional measures to address those areas" in which the multi-line PICC had not been eliminated.[41] However, the broad review of the PICC contemplated by the Commission's 2000 *CALLS Order* did not happen and the rule adopted by the *CALLS Order* – 47 C.F.R. § 69.153 – remains in place today.[42] As a result, several CLEC competitors of Birch continue to have interstate access tariffs on file with the Commission that contain PICCs, including:

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38 *CALLS Order* ¶¶ 76, 105.

39 *CALLS Order* ¶ 31.

40 *Access Charge Reform*, 18 FCC Rcd 14976, ¶ 9, n.39 (2003) (Exhibit 8 hereto).

41 *CALLS Order* ¶¶ 110-11.

42 The FCC, however, has addressed the recovery of PICC in connection with carriers seeking to convert their average schedule study areas to the regulatory requirements applicable to price cap carriers, and required those carriers to forego any recovery of PICC, CCL, or SLC as a condition of the waiver. *See, e.g., CenturyLink Petition*

- Broadview Networks[43]
- Cinergy Communications Company[44]
- CMN-RUS, Inc.[45]
- First Communications, LLC[46]
- Metro Fibernet, LLC[47]
- New Horizon Communications Corp.[48]

Complainants' claim most carriers no longer assess a PICC, but the identified CLEC tariffs and Birch's own experience indicate otherwise.[49] For example, when Birch acts as the presubscribed interexchange carrier for a multi-line business customer in the BellSouth region, Birch receives invoices that include PICC from Access Point Inc., a CLEC providing services in the state of North Carolina.[50]

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for Conversion of Average Schedule Affiliates to Price Cap Regulation and for Limited Waiver Relief, 29 FCC Rcd 5140, ¶ 2 (2014) (Exhibit 37 hereto).

[43] Hayes Affidavit ¶ 6; *see also* Broadview Networks, Inc., Tariff F.C.C. No. 3, § 8.3.2 (Exhibit 8 to Hayes Affidavit).

[44] Hayes Affidavit ¶ 6; *see also* Cinergy Communications Company, Tariff FCC No. 1, § 6.2.2 (Exhibit 9 to Hayes Affidavit).

[45] Hayes Affidavit ¶ 6; *see also* CMN-RUS, Inc. Tariff FCC No. 2, § 6.2.2 (Exhibit 10 to Hayes Affidavit).

[46] Hayes Affidavit ¶ 6; *see also* First Communications, LLC F.C.C. Tariff No. 3, § 6.3 (Exhibit 11 to Hayes Affidavit).

[47] Hayes Affidavit ¶ 6; *see also* Metro Fibernet, LLC Tariff FCC No. 1, § 6.2.2 (Exhibit 12 to Hayes Affidavit).

[48] Hayes Affidavit ¶ 6; *see also* New Horizons Communications Corp. Tariff F.C.C. 1, § 12.2.4 (Exhibit 13 to Hayes Affidavit).

[49] Complainants' Legal Analysis in Support of Formal Complaint at 24 ("Compl. Br.").

[50] *See* Hayes Affidavit at n.2; *see also* Exhibit 5 to Hayes Affidavit.

2. The 2001 CLEC Access Charge Order and Rule 61.26(c)

In its *2001 CLEC Access Charge Order*,[51] the Commission addressed the types of charges to include in the switched exchange access service benchmark. In the text of paragraph 55, the Commission stated:

> Using traditional ILEC nomenclature, it appears that most CLECs seek compensation for the same basic elements, however precisely named: (1) common line charges; (2) local switching; and (3) transport. The only requirement is that the aggregate charge for these services, however described in their tariffs, cannot exceed our benchmark.[52]

In adopting 47 C.F.R. § 61.26(a)(3)(i), the Commission enumerated with specificity the rate elements to be included in the benchmark for "switched exchange access services:"

> The functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: Carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching;

No mention is made of PICC, nor would it make sense to include a flat per line charge in the definition of components of a per-minute of use rate.[53] The PICC was established pursuant to 47 C.F.R. § 69.153 ("a charge expressed in dollars and cents per line"), and if the Commission had intended to include the PICC, the PICC presumably would have been expressly referenced.

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[51] *Access Charge Reform*, 16 FCC Rcd 9923 (2001) ("*2001 CLEC Access Charge Order*") (Exhibit 4 hereto).

[52] *2001 CLEC Access Charge Order* ¶ 55 (footnote omitted).

[53] The switched exchange access service benchmark rule allows CLECs the freedom to impose their own mix of charges, whether per-minute or flat-rate, in their discretion, subject to an overall cap of the ILEC rate. *2001 CLEC Access Charge Order* ¶ 54. The fact that CLECs have such theoretical freedom does not mean, however, that the Commission's regulation defining the switched exchange access service benchmark should be interpreted to mix together per-minute and non-switched exchange access service flat-rate charges. As a practical matter, a CLEC will maximize revenue if it mirrors the per-minute charges of the competing ILEC because any other mix of rates will result in lost revenues if switched exchange access service charges come up less than the competing ILEC rate and will run afoul of 47 C.F.R. § 61.26(c) if the charges are higher. Furthermore, it would be irrational for the Commission to include a mechanism for the recovery of NTS costs, *i.e.*, PICC, in the benchmark rule designed for the recovery of traffic sensitive costs, *i.e.*, switched exchange access service rates when the costs associated with PICC were removed from the switched access structure because they were NTS. For this reason, the PICC appropriately is separate from and not included in the benchmark rule for switched exchange access service.

Thus, the question is whether the absence of any reference to the PICC in paragraph 55 was intentional and meant to exclude PICC from the switched exchange access service benchmark or whether the PICC was intended to be included in the switched exchange access service benchmark and is subsumed by the explicitly referenced rate elements.

Birch respectfully submits that it is the former. The paragraph immediately preceding the above-quoted paragraph 55 of the *2001 CLEC Access Charge Order* specifically and explicitly addressed the PICC:

> For example, CLECs shall be permitted to set their tariffed rates so that they receive revenues equivalent to those that the ILECs receive through the presubscribed interexchange carrier charge (PICC), to the extent that it survives in the wake of our *CALLS Order*.[54]

Having explicitly addressed recovery of the PICC in paragraph 54 of the *2001 CLEC Access Charge Order*, if the Commission had intended that this charge be included in the switched exchange access service benchmark discussed in paragraph 55 of the *2001 CLEC Access Charge Order*, it would be expected that the PICC would have been explicitly identified in the enumeration of included rate elements. In the absence of such identification, the inference that should be drawn is that the PICC is separate from the switched exchange access service benchmark.[55]

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[54] *2001 CLEC Access Charge Order* ¶ 54 (footnote omitted). The PICC did survive the *CALLS Order*. *See, e.g., Connect America Fund, et al.*, 26 FCC Rcd 4554, ¶ 236, n.370 (2011) (Exhibit 14 hereto) (stating that the *CALLS Order* permitted carriers to recover revenues through two charges paid by interexchange carriers: "the multiline business presubscribed interexchange carrier charge (MLB PICC) -- a flat per-line charge assessed on the interexchange carrier to whom the customer is presubscribed, ***and*** the carrier common line (CCL) charge -- a per-minute charge assessed on interstate interexchange traffic") (emphasis added). The Commission further stated it "capped the MLB PICC at $4.31 per line per month and permitted recovery of the CCL charge only to the extent that a price cap carrier could not recover its allowable revenues through SLCs, [interstate access support or "IAS"], and MLB PICCs." *See id.*

[55] When Congress includes language in one section of a statute but not in another, it is generally presumed that the disparity is intentional. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (Exhibit 21 hereto) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). The Commission specifically has recognized this particular canon of statutory construction. *See, e.g., Implementation of Section 203 of the Satellite Television Extension & Localism Act of 2010 (STELA)*, 25 FCC Rcd 10430, ¶ 16 (2010)

Complainants in their brief quote the above sentence from paragraph 54 of the *2001 CLEC Access Charge Order* five times.[56] Neither this sentence nor anything else in paragraph 54 or the footnotes thereto say that the PICC is to be subject to the switched exchange access service benchmark under 47 C.F.R. § 61.26(c). The quoted sentence, rather, is an acknowledgement of CLEC authority ("CLECs shall be permitted . . ."), not a restriction. Specifically, the sentence permits CLECs to charge the PICC on an "equivalent" basis to ILECs, *i.e.*, subject to a cap of $4.31 per line per month (under 47 C.F.R. § 69.153(a)). Birch charges $2.50 per line per month to interexchange carriers with presubscribed customers purchasing multi-line business service.[57]

Complainants' assertion that PICC is encompassed by "switched exchange access service" is wrong. [58] The authorities they cite characterize PICC as being part of "access service," and the law is clear that not all access services are switched exchange access services as set forth above. The term "switched exchange access service" refers to origination or termination of <u>all</u> IXC customer calls to users on a local exchange carrier network that involve local switching and are charged on a per-minute of use basis.[59] The PICC, on the other hand, as part of the FCC's interstate access charge reform policy to eliminate implicit subsidies, is a flat

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(Exhibit 19 hereto) ("We presume that Congress acted intentionally and purposely when it chose to discard the 'same network affiliate' language in Section 340(b)(2)(A), which language the Commission had relied upon for its more restrictive interpretation of Section 340(b)(1)"); *Applications of AT&T, Inc. and Deutsche Telekom AG*, 27 FCC Rcd 5618, ¶ 11 (2012) (Exhibit 31 hereto) ("DTP misapplies the tenet of statutory construction that where Congress includes language in one section of a statute but not in another, it is generally presumed that the disparity was intentional.").

[56] Compl. Br. at 4, 9, 15, 16, 21.

[57] Birch Communications Access Services Tariff, Tariff FCC No. 1, § 6.3 (eff. Oct. 24, 2008) (Exhibit I to Complaint) ("Birch FCC Tariff"); *see also supra* n.1.

[58] Compl. Br. at 12-13, nn. 94, 96-98.

[59] *See, e.g.*, 47 C.F.R. §§ 69.106(a), 69.111, 69.124, 69.154; *see also supra* Section I.

charge for access to a *particular customer* or limited subset of IXC customers – multi-line business customers - irrespective of amount of traffic.[60]

The interstate switched exchange access service rate at issue in Rule 61.26 is "the composite, per-minute rate" for interstate switched exchange access services, "including all applicable fixed and traffic-sensitive charges."[61] The Commission determined CLECs could express their interstate switched exchange access service charges as flat-rate charges or per-minute charges as long as the composite rate for those switched exchange access service charges did not exceed the competing ILEC rate for similar services.[62] The Commission explained it considers the "'composite rate' to be the amount billed for a given period divided by the minutes of use" with applicable "flat rated elements or per mile charges" translated into a per-minute rate.[63] These statements do not support that the PICC was intended to be a component of the switched exchange access service benchmark and translated into a per-minute rate as suggested by CenturyLink.[64]

On the contrary, precedent reflects that the PICC was created to remove service costs associated with PICC from interstate switched exchange access service charges because the costs are non-traffic-sensitive and should only be recoverable in limited circumstances (*i.e.*, when multi-line business services are provided by a presubscribed IXC), and then only recovered on a per month, flat-rate basis, at a rate capped by FCC rule. The inclusion of PICC in a per-minute of use service charge such as switched exchange access service charge would obliterate the

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60 47 C.F.R. § 69.153(a).

61 47 C.F.R. § 61.26(a)(5).

62 *2001 CLEC Access Charge Order* ¶ 55; *see also* 47 C.F.R. § 61.26(c).

63 *2001 CLEC Access Charge Order* n.109.

64 Complaint ¶ 23.

Commission's policy for ensuring costs are "recovered in the manner in which they are incurred."[65]

The distinction between switched exchange access services and other access services such as PICC is further confirmed by the Commission's decision in *AT&T v. BTI*.[66] Exactly one month to the date of the release of the *2001 CLEC Access Charge Order*, the Commission was called upon to review a CLEC's switched exchange access service rate as compared to BellSouth. With the *2001 CLEC Access Charge Order* fresh in its mind, the Commission found that "ILEC switched access services are functionally equivalent to CLEC switched access services."[67] In doing so, it identified "the following [BellSouth] access rate elements . . . access tandem (facility), access tandem (termination), access tandem (switching), carrier common line charge (originating), carrier common line (terminating), local switching, information surcharge, transport interconnection charge, and common multiplexing" as the appropriate comparison to review the CLEC's switched exchange access service rate.[68] The Commission did not include the PICC, and in response to suggestions the PICC should be included in the switched access service rate calculation, the FCC declined because there was no methodology "for 'per-minutizing' this flat per-line charge."[69]

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65 *Access Charge Reform*, 18 FCC Rcd 14976, ¶ 2 (2003) (Exhibit 8 hereto). As explained above, the Commission went to great lengths to ensure that "non-traffic-sensitive costs–costs that do not vary with the amount of traffic carried over the facilities–should be recovered through flat-rate charges, and traffic-sensitive costs should be recovered through per-minute charges[,]" "which fosters competition and efficient pricing." *Id.*

66 *AT&T v. BTI*, 16 FCC Rcd 12312 (2001) (Exhibit 33 hereto) ("*BTI*").

67 *BTI* ¶ 31.

68 *BTI* at n.102. Notably, the list of elements used by the Commission is nearly identical to the list of rate elements stipulated by the parties as to what constitutes BellSouth's rate. *See* Joint Stipulation of Facts ¶ 13 (Exhibit A to Complaint).

69 *BTI* at n.102.

In addition, the PICC is not functionally equivalent to the carrier common line ("CCL") charge as CenturyLink contends.[70] The CCL is one of the charges enumerated in 47 C.F.R. § 61.26(a)(3)(i); the PICC is not. Under the Commission's rules, local exchange carriers are permitted to impose per-minute CCL charges on originating minutes and terminating minutes in addition to the PICC.[71] The PICC and CCL are contained in separate provisions of the Commission's rules, and are permitted to be applied to recover costs in very different ways.[72] The PICC and CCL charges also were contained in different sections of BellSouth's interstate access service tariff.[73] Further, the FCC has stated the "CCL charge is customarily billed by the LEC based upon the IXCs' minutes of use measured at the end office switch,"[74] whereas the PICC is permitted to be assessed only for multi-line business customers presubscribed to the IXC.[75] The PICC is a method by which carriers may recover certain non-traffic-sensitive common line costs associated with a specific service – multi-line business. It is not a substitute for the CCL:

> The Commission's rules permit price cap LECs to recover their permitted common line revenues through: (1) a monthly per-line subscriber line charge (SLC) billed to end users; (2) a monthly per-line pre-subscribed interexchange carrier charge (PICC) billed to the IXCs to whom the end user has presubscribed; and (3) a per-minute carrier common line (CCL) charge billed to IXCs.[76]

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70 Compl. Br. at 14.

71 *1997 Access Charge Order* ¶ 60; *see also Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, 13 FCC Rcd 14238, ¶ 32 (1998) (Exhibit 6 hereto).

72 *Compare* 47 C.F.R. § 69.153 to 47 C.F.R. § 69.154.

73 *See, e.g.*, BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1, Access Service, §§ 3.1, 3.8.6, 3.9.2, General Description and Presubscribed Interexchange Carrier Charge (Pages 3-1, 3-17.1, 3-18) (providing historical tariff pages) (Exhibit 7 to Collins Affidavit).

74 *Ameritech Operating Companies*, 11 FCC Rcd 14028, ¶ 7 (1996) (Exhibit 30 hereto).

75 47 C.F.R. § 69.153; *see also CALLS Order* ¶¶ 76, 105.

76 *Tariffs Implementing Access Charge Reform*, 13 FCC Rcd 20039, ¶ 3 (1998) (Exhibit 16 hereto).

Complainants similarly are incorrect that the "ILEC benchmark rate caps *all* charges billed by CLECs for switched access services, regardless of how they are described in the tariff."[77] For example, the Commission has twice rejected requests to find that 8YY database query charges are to be subject to the switched exchange access service benchmark or capped at the ILEC rate for the same service.[78] In the *2001 CLEC Access Charge Order*, the Commission stated:

> Late in this proceeding, Sprint argued that CLEC toll-free database query charges should also be subject to a tariff benchmark or should be detariffed above the rate of the competing ILEC. . . . Given the dearth of record evidence on this issue, we decline at this time to impose by rule the limit on database query charges that Sprint proposes. We expect, however, that CLECs will not look to this category of tariffed charges to make up for access revenues that the benchmark system denies them.[79]

The Commission, thus, clearly contemplated that the toll-free database query charges would be separate from and in addition to the benchmark rate cap system applicable to CLEC interstate switched exchange access services.[80] Similarly, other types of "access services" also are not part of the per-minute switched exchange access service benchmark, such as line information database ("LIDB") query[81] charges, and local number portability ("LNP") database query

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77 Compl. Br. at 11 (emphasis in original).

78 *See, e.g.*, *2001 CLEC Access Charge Order* at n.128; *Access Charge Reform*, 19 FCC Rcd 9108, at n.251 (2004) ("*2004 CLEC Access Charge Order*") (Exhibit 5 hereto).

79 *2001 CLEC Access Charge Order* at n.128; *see also 2004 CLEC Access Charge Order* at n.251 ("Because we find that IXC allegations of wide-spread fraud or abuse may indeed be overstated, we also reject AT&T's request that we limit 8YY database query charges based on the incumbent LEC charges.").

80 As implicitly acknowledged in ¶ 6 of the Complaint and n.3 of Compl. Br., CenturyLink has been short-paying Birch's 8YY charges. *See* Hayes Affidavit at n.10. Such self-help is not permissible. *NOS Communications, Inc., Complainant v. American Telephone and Telegraph Company, Defendant*, 7 FCC Rcd 7889, ¶ 2 (1992) (Exhibit 27 hereto) (party "is not entitled to the self-help measure of withholding payment for tariffed services duly performed"). Although the Delaware federal district court in Birch's collection action against CenturyLink entered a stipulated Order on January 8, 2018 referring the issue of the legality of Birch's 8YY charges to the Commission on the basis of primary jurisdiction (Exhibit F to Complaint), CenturyLink has not included this issue in its Formal Complaint. *See* Complaint ¶¶ 6, 8, 52.

81 A "per query" charge is permitted for obtaining validation information from the line information database. 47 C.F.R. § 69.120. The database provides billing name and address ("BNA") information to the querying carrier.

charges.[82] Similar to the PICC, these access services are reflected in Section 6 of the Birch FCC Tariff, separate and apart from switched exchange access services,[83] and are not rate elements of interstate switched exchange access services or intended to be covered by the benchmark rule. Thus, the benchmark is not as comprehensive as described by Complainants, and there is no anomaly that PICC and other access services are outside the benchmark for switched exchange access service rates.

Complainants assert that *when* the PICC is included as an element of the benchmark rule, the Birch switched exchange access service rates are approximately ten times higher than the switched exchange access service benchmark set by the BellSouth switched exchange access service rates.[84] Complainants' claim is belied by their own numbers. For example, for March 2015 (the month selected by Ms. Spocogee in ¶ 10 of her affidavit[85] and discussed in Complainants' Brief[86]), Birch billed CenturyLink for a total of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** (per Attachment 1 to that affidavit), of which PICC represented **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** (per Attachment 2 to that affidavit).[87] The ratio of PICC charges to non-PICC charges, thus, was

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82 A "per query" charge also applies for obtaining information on the routing of calls from the LNP database. *See Telephone Number Portability*, 13 FCC Rcd 11701 (1998) (Exhibit 18 hereto) (finding carrier-specific costs related to number portability could be recovered in two federal charges: (1) a monthly number portability charge recoverable from end users; and (2) a number portability query charge recoverable from carriers on whose behalf the local exchange carrier performs queries).

83 Birch FCC Tariff at Section 6.6., 6.7; *see also* BellSouth Telecommunications, LLC Tariff F.C.C. No. 1, Access Service §§ 6.1.3, 6.7.1, 6.8.11, 6.8.12, 19.1, 19.7 (Pages 6-62, 6-203, 6-379, 6-380, 19-1, 19-9) (setting forth LNP database query charges, 8YY database query charges, and LIDB database query charges separate from switched exchange access service charges) (Exhibit 8 to Collins Affidavit).

84 Compl. Br. at 27-28.

85 Exhibit N to Complaint.

86 Compl. Br. at 27-28.

87 Hayes Affidavit ¶ 14.

approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** not 10 times as alleged by Complainants.[88]

The Commission's universal service fund rules also recognize that PICCs are separate from per-minute switched exchange access service charges. On the FCC Form 499-A, PICCs revenue from IXCs is required to be reported on Line 303, while per-minute switched exchange access service revenue for originating or terminating calls is required to be reported on Line 304.[89] Similarly, the Commission has separately addressed PICC when it has capped or frozen switched exchange access service rates.[90] If PICC were part of switched exchange access service rates, the separate statement would not be necessary.

Birch respectfully submits that neither 47 C.F.R. § 61.26 nor the *2001 CLEC Access Charge Order* prescribe that the flat-rated PICC, which Birch charges only to IXCs with presubscribed multi-line business service customers, is a cost element to be recovered through the per-minute switched exchange access service benchmark rate applied to all IXC calls originated or terminated on the Birch network.

3. Other Authority Cited by Complainants

Complainants cite *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metro. Statistical Area*[91] in support of their argument that the PICC must be included within the benchmark for switched exchange access services.[92] As an initial matter, the language quoted by Complainants is *dicta* because the requested forbearance

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88 Hayes Affidavit ¶ 14.

89 2017 499-A Instructions at 22, 24 (Exhibit 49 hereto).

90 *See, e.g., 2011 Intercarrier Compensation Order* ¶ 818, n.1547 ("Meanwhile, we prohibit carriers from increasing their originating interstate access rates above those in effect as of the effective date of the rules. . . . This prohibition on increasing access rates also applies to any remaining [PICC] in section 69.153 of the Commission's rules . . . .").

91 25 FCC Rcd 8622 (2010) (Exhibit 23 hereto) ("*Qwest Forbearance Order*").

92 Compl. Br. at 13, n.99.

relief was denied, and hence the issue of what rates the petitioner could have charged as a non-dominant carrier was purely hypothetical. Moreover, in this hypothetical scenario, had petitioner received the forbearance relief, it no longer would have been subject to the cap on the SLC and, thus, as the opinion noted, could recover its common line revenues through this mechanism, without resort to a PICC.[93]

Complainants again rely upon *dicta* in their citation to *Connect America Fund*[94] for the proposition the PICC must be assessed within the switched exchange access service benchmark.[95] The issue in that ruling pertained to the symmetry rule for Voice over Internet Protocol ("VoIP") services, not PICC. Further, the *dicta* cited by Complainants is at best ambiguous: "Except in the limited circumstances where a PICC or CCL is being charged, there is no danger that competitive LECs would be recovering these costs through benchmarked access charges." This sentence recognizes that a PICC or CCL may be recovered by a CLEC, but only under "limited circumstances." Specifically, the PICC is a flat rate charge that is separate from the per-minute switched exchange access service benchmark and is subject to a cap of $4.31 per line per month per Commission rule; while the CCL is a per-minute charge recovered through the switched exchange access service benchmark rate and subject to Rule 61.26(c).[96]

Complainants point to the Commission's *2004 CLEC Access Charge Order*,[97] which states that rural CLECs may charge a PICC only if and to the extent that the ILEC charges a

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93 *Qwest Forbearance Order* ¶ 117.

94 30 FCC Rcd 1587, ¶ 8, n.27 (2015) (Exhibit 13 hereto).

95 Compl. Br. at 17, n.108.

96 As discussed above, the CCL and PICC are not functionally equivalent as Complainants contend. *See* Compl. Br. at 14. The CCL is separate from and is charged in addition to the PICC. *1997 Access Charge Order* ¶ 60; *see also Ameritech Operating Companies*, 11 FCC Rcd 14028, ¶ 7 (1996) (Exhibit 30 hereto). The CCL and PICC are contained in separate regulations and are subject to different prescriptions. *Compare* 47 C.F.R. § 69.153 to 47 C.F.R. § 69.154.

97 *2004 CLEC Access Charge Order* ¶ 76 ("any PICC imposed by a [CLEC] qualifying for the rural

PICC.[98] Complainants argue that it follows *a fortiori* that any other CLEC is so limited.[99] This is specious. As acknowledged by Complainants, rural CLECs are situated differently than other CLECs in that they are permitted to charge rates in excess of the switched exchange access service benchmark (*i.e.*, National Exchange Carrier Association or "NECA" rates) to recover higher loop costs.[100] In this context, it makes sense to restrict rural CLEC PICC because this would be double-dipping. Birch, on the other hand, cannot charge NECA rates and, thus, is permitted to recover its costs through the PICC. In fact, the *2004 CLEC Access Charge Order* cuts against Complainants because it shows that the Commission knows how to draft an explicit restriction of CLEC PICCs to match the ILEC PICCs when that is what it intends.[101]

II. ANY NEW RULE ADOPTED IN THIS ADJUDICATORY PROCEEDING REGARDING CALCULATION OF THE SWITCHED EXCHANGE ACCESS SERVICE BENCHMARK SHOULD BE APPLIED PROSPECTIVELY ONLY

The Supreme Court's decision in *SEC v. Chenery* holds that administrative agencies should be more circumspect than the courts in making new law through adjudications because administrative agencies, unlike courts, have the option of using rulemaking to make new law.[102] The D.C. Circuit has explained that whether to permit retroactive application of an agency decision "boil[s] down to ... a question grounded in notions of equity and fairness."[103] A court's

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exemption may be assessed in addition to the rural benchmark rate if and only to the extent that the competing [ILEC] charges a PICC").

98 Compl. Br. at 18, 21.

99 Compl. Br. at 18.

100 Compl. Br. at 19.

101 The sentence from paragraph 54 of the *2001 CLEC Access Charge Order* quoted in the text above permits CLECs to charge the PICC on an "equivalent" basis to ILECs, *i.e.*, subject to a cap of $4.31 per line per month (under 47 C.F.R. § 69.153(a)). If the Commission had intended to benchmark the PICC to the actual PICC charged by an ILEC for non-rural CLECs, it would have used language similar to that used for rural CLECs.

102 332 U.S. 194, 202 (1947) (Exhibit 20 hereto).

103 *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (Exhibit 36 hereto) (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C. Cir. 1987) (Exhibit 38 hereto)).

"judicial hackles" are raised when "an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates."[104]

The D.C. Circuit has identified five non-exclusive factors useful for determining when the retroactive effect of an adjudicatory decision is invalid:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[105]

In this case, the issue is one of first impression because there is no clear statute, regulation, or Commission order or decision addressing whether the PICC is or is not to be included in the switched exchange access service benchmark rate. There is, as noted above, however, authority which suggests that the PICC is separate and distinct, and there has been an established market practice of charging the PICC in addition to switched exchange access service charges. In these circumstances, it would be appropriate, if there is to be a pronouncement that the PICC is included in the switched exchange access service benchmark, to initiate a notice-and-comment rulemaking proceeding and inappropriate to adopt such a rule in a two-party adjudication:

> The Commission's forbearance rule was adopted in a notice-and-comment rulemaking proceeding. . . . Any change in this fundamental policy would have a significant impact on a broad range of customers and providers of telecommunications services across the nation. It would be inappropriate for us to consider a modification or repeal of this policy, with so potentially widespread an impact, in the context of a two-party

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104 *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Exhibit 43 hereto).

105 *Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (Exhibit 22 hereto).

> adjudicatory proceeding, as opposed to a rulemaking proceeding. In a rulemaking, all interested parties will have the opportunity to comment. In addition, a rulemaking proceeding will permit us to address [the] rule as it applies to all nondominant carriers, and to consider and implement any changes that we may make to it on an industry-wide basis. Given the fundamental importance of these matters, the coordinated and comprehensive approach made possible by a rulemaking will reduce industry uncertainty, while ensuring the smoothest possible transition to any new rules that may be necessary. . . . By contrast, any order that we issue on AT&T's complaint would necessarily bind only MCI. At the same time, such an order would have major precedential implications for other nondominant IXCs, and could, depending upon the decision, create considerable uncertainty both as to their regulatory status and the lawfulness of many of their current offerings.[106]

Thus, if the Commission is to prescribe a new rule in this adjudicatory proceeding that the PICC is to be included within the calculation of the switched exchange access service benchmark, such a rule should be given prospective effect only. Otherwise, Birch as well as a raft of its competitors, each of which no doubt has provided services to several or more IXCs and charged them separate PICCs pursuant to each competitor's respective tariff, will be hit with a plethora of refund claims which may give rise to disputes requiring adjudication by the Commission. The unfairness and disruption caused by upending the long-standing market practice retroactively would only be exacerbated if Complainants were to succeed in their novel "*ab initio*" argument that CLECs must not only refund the amount by which the combined rates including PICC exceeded the switched exchange access service benchmark rates but also forfeit the amounts charged within the switched exchange access service benchmark safe harbor.

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[106] *AT&T Communications v. MCI Telecommunications Corp.*, 7 FCC Rcd 807, ¶ 16, n.29 (1992) (Exhibit 35 hereto) (internal citations omitted), *vacated on other grounds*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (Exhibit 29 hereto), *cert. denied* 509 U.S. 913 (1993); *see also Disabilities Rights, Inc. v. Sprint Relay*, 15 FCC Rcd 9374, ¶ 3 (2000) (Exhibit 40 hereto) ("we conclude that the issues raised in the complaint have broad, industry-wide implications that are more appropriately addressed in the Commission's pending CC Docket No. 98-67 proceeding, in which all interested parties will have the opportunity to participate").

III. COMPLAINANTS HAVE STIPULATED THAT THE BIRCH SWITCHED EXCHANGE ACCESS SERVICE RATES ARE EQUAL TO THE BELLSOUTH RATES; COMPLAINANTS ARE NOT ENTITLED TO A REFUND OF ALL BIRCH TARIFFED ACCESS CHARGES

Complainants cite *AT&T Services Inc. v. Great Lakes Comnet, Inc.* ("*Comnet*")[107] five times in support of their argument that the Birch FCC Tariff was void *ab initio* and that Complainants accordingly are entitled to a full refund of all charges paid.[108] That decision did not address the PICC. Further, while the Commission in that case, under the facts of that case, held that a tariff providing for excessive rates was void *ab initio*, the Commission did not reach the question of the measure of damages to be awarded. Rather, it deferred consideration of that question until the damages phase of the case.[109]

Complainants have stipulated that the Birch switched exchange access service charges imposed under Section 5 of the Birch FCC Tariff were equal to the BellSouth switched exchange access service rate benchmark and, thus, cannot now dispute that such charges were not just and reasonable and deemed lawful.[110] Complainants do not cite a single decision in which a

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107 30 FCC Rcd 2586 (2015) (Exhibit 12 hereto).

108 Compl. Br. at 1, n.61; 2, n.67; 31, n.163; 32, n.166; 36, n.180.

109 *Comnet* ¶ 4. The Commission's *void ab initio* policy applies only to switched exchange access service rates because those are the only rates not subject to mandatory detariffing. *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 15 FCC Rcd 22321 (2000) (Exhibit 50 hereto). If those rates exceed the applicable benchmark for switched exchange access services in 47 C.F.R. § 61.26, those rates, along with any other access service rates included in the access tariff that would not otherwise have been eligible for tariffing, lose the right to be tariffed. *See 2001 CLEC Access Charge Order* ¶ 40 ("Above the benchmark, CLECs will be mandatorily detariffed."). Thus, only if CLEC switched exchange access service rates are unlawful are all other tariffed rates no longer entitled to the protection of the tariff. That is not the case here as Complainants have stipulated that the Birch switched exchange access service rates are equal to the BellSouth switched exchange access service benchmark rate. *See* Joint Stipulation of Facts ¶ 15 (Exhibit A to Complaint).

110 *See* Joint Stipulation of Facts ¶ 15 (Exhibit A to Complaint); Complaint ¶ 16, n.22 (rate sheets for the Birch FCC Tariff were filed on at least 15 days' notice pursuant to 47 U.S.C. § 204). Notwithstanding such stipulation, CenturyLink has been short-paying the remote/host additive charge portion of the Birch switched exchange access service rate that it has stipulated is equal to the BellSouth switched exchange access service benchmark rate. *See* Exhibits D at 12-14, E, ¶¶ 7, 10-15 to Complaint; *see also* Hayes Declaration at n.10. Such self-help is not permissible. *NOS Communications, Inc., Complainant v. American Telephone and Telegraph Company, Defendant*, 7 FCC Rcd 7889, ¶ 2 (1992) (Exhibit 27 hereto) (finding a party "is not entitled to the self-help measure of withholding payment for tariffed services duly performed"). Although the Delaware federal district court in Birch's collection action against CenturyLink entered a stipulated Order on January 8, 2018 referring the issue of the

petitioner recovered not only the overcharges but also the lawfully imposed charges for services received.[111] Petitioners acknowledge, however, that there are cases in which the Commission has found tariffs to be void *ab initio* and have permitted recovery only of individual overcharges.[112] The recovery being sought by Complainants here, in contrast, would afford them a windfall and impose a punitive forfeiture on Birch.[113] Taken to the extreme, this would give IXCs a strong incentive to challenge tariff elements resulting in immaterial asserted overcharges in the hopes of gaining outsized recoveries on a forfeiture theory.[114] This would not be good public policy.

In any event, if the Commission were willing to entertain Complainants' request for return of lawfully imposed charges, the Commission would need to adjudicate Birch's associated affirmative defense (presumably, in a bifurcated damages phase) of implied contract. This would entail discovery and likely factual disputes as well as legal briefing.[115]

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legality of Birch's remote/host and 8YY charges to the Commission on the basis of primary jurisdiction (Exhibit F to Complaint), CenturyLink has not included these issues in its Complaint. *See* Complaint ¶¶ 6, 8, 52.

111 *AT&T Corp. v. Iowa Network Services, Inc*., 2017 WL 5237210, at *11 (2017) (Exhibit 34 hereto) (Commission will conduct separate damages phase to establish what the appropriate tariff should have been); *AT&T Corp. v. All American Telephone Co.*, 28 FCC Rcd 3477, 3494 (2013) (Exhibit 32 hereto) (entirety of charges under tariff were unlawful, so there was no issue of any charges or portions thereof being lawful); *Peerless Network, Inc. v. MCI Communications Services, Inc*., 2015 WL 2455128, at *10 (N.D. Ill. 2015) (Exhibit 47 hereto) (charges were outside of tariff, and there was no issue of allocating between proper and improper tariffed charges).

112 Compl. Br. at 33, n.167.

113 *See PAETEC Communications, Inc. v. MCI Communications Services, Inc.*, 712 F. Supp. 2d 405, 420-21 (E.D. Pa. 2010) (Exhibit 45 hereto) (noting uncertainty as to the FCC's pronouncements regarding detariffing and refunds in context of proceeding where CLEC charged rates within the benchmark and rates in excess of the benchmark under a single tariff), 784 F.Supp.2d 542, 549 (E.D. Pa. 2011) (Exhibit 46 hereto) (awarding CLEC monetary relief for charges within benchmark and denying IXC refund for charges above benchmark based on deemed lawful tariff).

114 *Comnet* is not to the contrary. In *Comnet*, the issue was whether the defendants failed to benchmark their rates to the ILEC. *See Comnet* ¶ 25. As a result, the tariff was held to be void *ab initio*. In the present case, Complainants have stipulated that the Birch switched exchange access service rates were properly benchmarked. Joint Stipulation of Facts ¶¶ 15, 17 (Exhibit A to Complaint). It would be the tail wagging the dog to invalidate lawful charges by virtue of a finding that a separate add-on for a completely different service was impermissible.

115 *See* Hayes Affidavit ¶¶ 16-17 (providing a response to the numerical figures proposed by Complainants); *see also* Exhibit 1 to Hayes Affidavit.

IV. ANY INTEREST TO BE AWARDED TO COMPLAINANTS SHOULD BE BASED ON THE IRS RATE FOR CORPORATE OVERPAYMENTS

While no retroactive monetary relief should be awarded in this proceeding, if any is to be awarded, the applicable rate of interest would be the Internal Revenue Service ("IRS") rate for corporate overpayments.[116] Complainants acknowledge that this rate is 3% per annum, compounded daily.[117] Putting aside the appropriate percentage, Complainants' calculations of interest are wildly overstated.[118] It appears from Attachment 3 to Exhibit N to the Complaint that interest in respect of any given month's payment is calculated from the month paid on a stand-alone basis as well as for each successive month on a cumulative basis. For example, the interest on the February 2015 CenturyLink payment is calculated for approximately 36 months on the 2/08/2015 row.[119] Then such interest is calculated again for approximately 35 months as part of the cumulative total on the 3/08/2015 row, for approximately 34 months as part of the cumulative total on the 4/08/2015 row, etc. The result is that Complainants are seeking to recover a total of 666 months (or 55.5 years) of interest charges on the February 2015 payment. The March 2015 payment, similarly, is subject to 630 months of interest.[120] The April 2015 payment is subject to 595 months of interest, and so forth through the February 2018 payment. The same flaw appears in the schedule of Level 3 interest calculations in Attachment 4 to Exhibit N to the Complaint.[121]

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116 *See, e.g., Contel of the South, Inc. v. Operator Communications, Inc.*, 23 FCC Rcd 548, ¶ 20 (2008) (Exhibit 39).

117 Complaint ¶¶ 37, n.46.

118 Hayes Affidavit ¶¶ 18-19; *see also* Exhibit 2 to Hayes Affidavit.

119 Hayes Affidavit ¶ 19; *see also* Exhibit 2 to Hayes Affidavit.

120 Hayes Affidavit ¶ 19; *see also* Exhibit 2 to Hayes Affidavit.

121 Hayes Affidavit ¶ 19; *see also* Exhibit 2 to Hayes Affidavit.

Obviously, any prejudgment interest should be calculated only for the period from the date the payment being refunded was made through the date of the award.

CONCLUSION

For the foregoing reasons, Complainants are not entitled to any relief as respects the lawfully tariffed PICC, and any relief awarded should be limited to prospective declaratory relief.

Respectfully submitted,

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Dated: April 23, 2018

LIST OF EXHIBITS TO BRIEF IN SUPPORT OF ANSWER

Exhibit	Description
1	47 C.F.R. § 69.1, *et seq.*
2	47 C.F.R. § 61.26
3	*1997 Reconsideration Order*, 12 FCC Rcd 16606 (1997)
4	*2001 CLEC Access Charge Order*, 16 FCC Rcd 9923 (2001)
5	*2004 CLEC Access Charge Order*, 19 FCC Rcd 9108 (2004)
6	*Access Charge Reform*, 13 FCC Rcd 14238 (1998)
7	*Access Charge Reform*, 18 FCC Rcd 12626 (2003)
8	*Access Charge Reform*, 18 FCC Rcd 14976 (2003)
9	*Primary Lines*, 14 FCC Rcd 4205 (1999)
10	*1997 Access Charge Order*, 12 FCC Rcd 15982 (1997)
11	*CALLS Order*, 15 FCC Rcd 12962 (2000)
12	*Comnet*, 30 FCC Rcd 2586 (2015)
13	*Connect America Fund*, 30 FCC Rcd 1587 (2015)
14	*Connect America Fund*, 26 FCC Rcd 4554 (2011)
15	*2011 Intercarrier Compensation Order*, 26 FCC Rcd 17663 (2011)
16	*Tariffs Implementing Access Charge Reform*, 13 FCC Rcd 20039 (1998)
17	*Technology Transitions*, 31 FCC Rcd 8283 (2016)
18	*Telephone Number Portability*, 13 FCC Rcd 11701 (1998)
19	*Implementation of Section 203 of the Satellite Television Extension & Localism Act of 2010 (STELA)*, 25 FCC Rcd 10430 (2010)
20	*SEC v. Chenery*, 332 U.S. 194 (1947)

Exhibit	Description
21	*Russello v. United States*, 464 U.S. 16 (1983)
22	*Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972)
23	*Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metro. Statistical Area*, 25 FCC Rcd. 8622 (2010)
24	*Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metro. Statistical Areas*, 23 FCC Rcd 11729 (2008)
25	WC Docket No. 07-270, *Notice of Domestic Section 214 Authorization Granted*, Public Notice, DA 07-5109 (rel. Dec. 31, 2007)
26	WC Docket No. 07-270, *Domestic Section 214 Application filed for the Transfer of Control of Birch Telecom, Inc. to Access Integrated Networks, Inc.*, Public Notice, DA 07-4784 (rel. Nov. 29, 2007)
27	*NOS Communications, Inc., Complainant v. American Telephone and Telegraph Company, Defendant*, 7 FCC Rcd 7889 (1992)
28	*Access Integrated Networks d/b/a Birch Communications*, ITC-214-19970926-00584 (Nov. 14, 2008)
29	*AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied* 509 U.S. 913 (1993)
30	*Ameritech Operating Companies*, 11 FCC Rcd 14028 (1996)
31	*Applications of AT&T, Inc. and Deutsche Telekom AG*, 27 FCC Rcd 5618 (2012)
32	*AT&T Corp. v. All American Telephone Co.*, 28 FCC Rcd 3477 (2013)
33	*AT&T v. BTI*, 16 FCC Rcd 12312 (2001)
34	*AT&T Corp. v. Iowa Network Services, Inc.*, 2017 WL 5237210 (2017)
35	*AT&T Communications v. MCI Telecommunications Corp.*, 7 FCC Rcd 807 (1992)
36	*Cassell v. FCC*, 154 F.3d 478 (D.C. Cir. 1998)

Exhibit	Description
37	*CenturyLink Petition for Conversion of Average Schedule Affiliates to Price Cap Regulation and for Limited Waiver Relief*, 29 FCC Rcd 5140 (2014)
38	*Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C. Cir. 1987)
39	*Contel of the South, Inc. v. Operator Communications, Inc.*, 23 FCC Rcd 548 (2008)
40	*Disabilities Rights, Inc. v. Sprint Relay*, 15 FCC Rcd 9374 (2000)
41	*Investigation of Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082 (1984)
42	*MTS and WATS Market Structure*, 93 F.C.C.2d 241 (1983)
43	*NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966)
44	*NYNEX Telephone Companies Petition for Waiver*, 10 FCC Rcd 7445 (1995)
45	*PAETEC Communications, Inc. v. MCI Communications Services, Inc.*, 712 F.Supp.2d 405 (E.D. Pa. 2010)
46	*PAETEC Communications, Inc. v. MCI Communications Services, Inc.*, 784 F.Supp.2d 542 (E.D. Pa. 2011)
47	*Peerless Network, Inc. v. MCI Communications Services, Inc.*, 2015 WL 2455128, N.D. Ill. 2015)
48	*Operator Communications, Inc., Complainant v. Contel of the South, Inc. d/b/a Verizon Mid-States, et al., Defendants*, 20 FCC Rcd 19783 (2005)
49	2017 499-A Instructions (2017)
50	*Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 15 FCC Rcd 22321 (2000)

CERTIFICATE OF SERVICE

I, Angela F. Collins, hereby certify that, on this 23rd day of April 2018, copies of the Birch Communications, LLC Answer to Formal Complaint of CenturyLink and Level 3 (and accompanying exhibits) and the Birch Communications, LLC Brief in Support of Answer (and accompanying exhibits) were served on the following via the method indicated below:

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